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No. 518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend, *Petitioner*,

v.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE FEDERAL QUESTIONS WERE TIMELY RAISED

Respondents assert that the federal questions presented by petitioner were not timely raised because they were first asserted in a petition for rehearing of the decision of the Iowa Supreme Court. Respondents, citing Iowa cases,[1] say that the Iowa Supreme Court

[1] Jacobs v. City of Chariton, 245 Iowa 1378, 65 N.W.2d 561 (1954); Wehrman v. Farmers & Merch. Sav. Bank, 221 Iowa 249, 259 N.W. 564 (1935).

declined to consider the constitutional questions raised by petitioner because of an Iowa rule of practice. (Br. in Opp. p. 18). Any such rule is not binding on this Court in all circumstances, and there is no indication in the bare order of the Iowa Supreme Court—"rehearing denied" (R. 938)—that it did decline to consider the constitutional questions. The court unquestionably entertained petitioner's timely-filed petition for rehearing. It is just as consistent with the terms of its order that the Iowa Supreme Court considered petitioner's constitutional claims and rejected them on their merits as that it refused to consider them because they were not timely raised. *Cf. Konigsberg* v. *State Bar,* 353 U.S. 252, 254-58 (1957).

We recognize, however, the rule of this Court that "ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more." *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313, 320 (1930). That rule is a specific application of the general rule governing the Court's jurisdiction, that a state court that does not expressly pass upon a federal claim will not be taken to have denied it unless the claim was advanced at the earliest opportunity available under the state's practice. The rule does not apply, therefore, when the state court whose decision it is sought to bring here has departed from prior law or introduced some other surprising element into its decision. On these occasions a petition for rehearing affords the first real opportunity for asserting the federal claim, and the case is properly here even though the state court's denial of rehearing is ambiguous with respect to whether the federal claim was passed upon. *Great Northern Ry.* v. *Sunburst Oil & Ref. Co.,* 287 U.S.

358, 366-67 (1932); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner, supra.* Or, as put by Mr. Justice Cardozo in a notable dissent, "The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely." *Herndon* v. *Georgia,* 295 U.S. 441, 447 (1935).

This case is within the "surprise" doctrine as thus defined. An Iowa statute, enacted in 1963, provides that "the parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian." Iowa Code § 633.559. A predecessor statute had provided very much the same thing. Iowa Code §§ 668.1, .2 (Pet. App. pp. 1a-2a). Consistently with the statute, the Iowa Supreme Court had ruled that, in the case of a dispute over custody between a parent and a non-parent, "if the parent is a proper and competent person, and has not waived or forfeited his right, custody must be awarded to him." *Wooley* v. *Schoop,* 234 Iowa 657, 660, 12 N.W.2d 597, 599 (1944), quoting from *Van Auken* v. *Wieman,* 128 Iowa 476, 104 N.W. 464 (1905). The Iowa court had also declared that "the statutory parental right of child custody . . . is an absolute right if the parent is properly qualified for the custody." *Joiner* v. *Knieriem,* 243 Iowa 470, 479, 52 N.W.2d 21, 26 (1952).[2]

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[2] See also Watters v. Watters, 243 Iowa 741, 744, 53 N.W.2d 162, 163 (1952) ("The unfitness which deprives a parent of the right to custody of a child must be positive, and not merely comparative").

Petitioner was awarded custody of his son by the trial court after a habeas corpus proceeding in which the principal claim of the respondents was that he was unfit and had relinquished his child to them. The court found that there was "no evidence that he is an unfit father" and "no evidence that he abandoned the child" and declared that it was convinced in those circumstances that it was "for the best interests of the child . . . that he be placed permanently in the care and custody of his father." (Pet. App. p. 20a). It paid no heed to petitioner's political and religious views, and it discounted the testimony of respondents' psychologist expert, who had never seen petitioner.

Had the trial court ruled that, despite the findings that petitioner was fit and had not abandoned his child, the child should remain with his grandparents because that would serve his best interests, constitutional doubts would have been raised. But there was no such ruling, and petitioner, defending the trial court's decision on appeal, thus had no occasion for raising any constitutional question. Nor was there reason to conclude that unless the Iowa Supreme Court disagreed with the trial court as to his fitness and his not having abandoned his child it would find, according to its customary verbal formula, that Mark's best interests required that he remain with his grandparents. Respondents argued on appeal that they should have custody regardless of petitioner's fitness or his continuing intention to bear the obligations of parenthood, but petitioner was not bound to contend in reply that acceptance of such an argument would yield an unconstitutional result. It was enough to say that the argument ran counter to Iowa law, as indeed it did.

For *Wooley* v. *Schoop, supra,* and the other cases from which we have quoted were on the books; and the governing statute had lately been revised to make it even clearer than before that a fit and qualified parent is entitled to custody of his own child. (See p. 3, *supra.*)

That this was the law of Iowa was plain at the time the appeal in this case was heard and decided. The decision in this case effectively changed the law, and this has lately been confirmed by the Iowa Supreme Court. In *Halstead* v. *Halstead,* 144 N.W.2d 861 (Iowa 1966), decided seven months after this case, *Wooley* v. *Schoop* was expressly overruled. The court, awarding custody of a 12-year-old boy to his grandparents over the claim of his mother, who was not found unfit or to have abandoned the child, said that "to the extent the majority opinion in Wooley v. Schoop . . . is in conflict herewith it is specifically overruled." 144 N.W.2d at 867.[3] Only with this express overruling of prior law, coming after the decision in petitioner's case, did it unmistakably become the law of Iowa that a fit parent who had not relinquished custody of a minor child could be deprived of that custody

[3] Although, as we suggest (p. 15, *infra*), there is a constitutional distinction between a case like this one, involving a continuing family unit, and a case in which the family unit has previously been destroyed by divorce, the Iowa court has assimilated the two situations. Both Wooley v. Schoop, 234 Iowa 657, 12 N.W.2d 597 (1944), asserting the right of a fit parent to custody, and Halstead v. Halstead, 144 N.W.2d 861 (Iowa 1966), overruling *Wooley* v. *Schoop,* were cases in which there had been a divorce. The *Halstead* opinion is in such terms as to make clear that the new rule that a fit, non-abandoning parent can be deprived of custody of his child because of the court's independent judgment that he would be better off with others applies in both divorce and non-divorce cases.

because of a court's judgment of what the child's best interests required. Prior cases cited by respondents (Br. in Opp. p. 23 n.11) are distinguishable, as are cases asserted by the Iowa court in the *Halstead* opinion to have undermined the rule of *Wooley* v. *Schoop*.[4]

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[4] There is unquestionably a great deal of language in the Iowa cases to the effect that the best interests of the child are the governing consideration in every custody case. We believe, however, that until the decisions in this case and in Halstead v. Halstead, 144 N.W.2d 861 (Iowa 1966), all the cases were consistent with the view expressed in In re McFarland's Guardianship, 214 Iowa 417, 425, 239 N.W. 702, 706. (1931), where the court said that a surviving parent is entitled to custody "unless it be that he had abandoned his child or forfeited or waived his rights to his custody, or unless it be that he is not a fit and suitable person to have his custody *and* that the best interests of the child require that his custody be entrusted to others." (Emphasis added). In other words, the court did not undertake to make its judgment of where the best interests of the child lay until the presumptive parental right to custody was overcome by a showing of relinquishment or unfitness. An analysis of the cases cited by respondents (Br. in Opp. p. 23 n.11) from this standpoint follows:

Drumb v. Keen, 47 Iowa 435 (1877) (father with "unsuitable home" denied custody until his home situation changed).

Werling v. Heggen, 208 Iowa 908, 225 N.W. 952 (1929) (child a hopeless invalid whose health would be endangered by moving to home of father from whom mother was separated with divorce action pending at her death).

Jensen v. Sorenson, 211 Iowa 354, 233 N.W. 717 (1930) (divorce; abandonment; prior court appointment of the non-parent contestant for custody as guardian with parent's full consent).

Ellison v. Platts, 226 Iowa 1211, 286 N.W. 413 (1939) (unfitness).

Paulson v. Windelow, 236 Iowa 1011, 20 N.W.2d 470 (1945) (twelve-year acquiescence in custody of non-parent).

Herr v. Lazor, 238 Iowa 518, 28 N.W.2d 11 (1947) (divorce; unfitness and probably abandonment).

Pelton v. Halverson, 240 Iowa 184, 35 N.W.2d 759 (1949) (implied waiver of custody in 11-year separation).

Petitioner thus was justified in relying upon the rule of parental right stated in the Iowa statutes and affirmed in case law and in arguing on that basis that if he was found a fit parent and found not to have abandoned his child he was entitled to custody. He was not obliged to argue that were he found fit and found not to have abandoned his child it would be unconstitutional to deprive him of custody of his child. Particularly petitioner was not bound to anticipate that he would be deprived of such custody on the basis of his political views (scarcely mentioned and not argued by respondents in the Iowa Supreme Court), his religious beliefs (laid bare at trial, to be sure, and argued by respondents as a reason that petitioner was unfit, not as an independent ground for denying custody to him) or the testimony, discredited by the trial court, of a psychologist who knew nothing of him or his fitness to be a parent.

Joiner v. Knieriem, 243 Iowa 470, 52 N.W.2d 21 (1952) (divorce; unfitness; court ruled that right of parent to custody "is an absolute right if the parent is properly qualified for the custody"; see p. 3, *supra*).

Durst v. Roach, 245 Iowa 342, 62 N.W.2d 159 (1954) (divorce; implied finding of unfitness and that parent had "discarded" child).

Finken v. Porter, 246 Iowa 1345, 72 N.W.2d 445 (1955) (divorce; unfitness).

McKay v. Ruffcorn, 247 Iowa 195, 73 N.W.2d 78 (1955) (five-and-a-half-year separation; unfitness).

Carrere v. Prunty, 133 N.W.2d 692 (Iowa 1965) (divorce; abandonment).

Childers v. Childres, 136 N.W.2d 268 (Iowa 1965) (six-and-a-half-year separation; abandonment).

Kouris v. Lunn, 136 N.W.2d 502 (Iowa 1965) (unfitness).

II. HAROLD PAINTER IS A FIT FATHER WHO IS QUALIFIED TO DETERMINE HIS SON MARK'S WELFARE

On respondents' professed view of the case the essential, relevant facts are (1) that at the time of the trial Mark had lived with the Bannisters for two years, (2) that in those two years Mark established a "family relationship" with the Bannisters (who are his grandparents), (3) that a child of Mark's age is better off if he remains "settled," and (4) that a change of Mark's custody would be "abrupt" because the Bannisters' home and way of life are more "conventional" and "stable" than the Painters'. On this view there would be no need to comb the record for every scrap of testimony casting doubt upon the character and personality of Mark's father. The greater part of respondents' statement of the case would be irrelevant, beginning with the fact that Harold Painter was placed in a foster home at age 2½ "because neither his mother nor his father were allowed to have him" (Br. in Opp. p. 3) and continuing through the fact that "throughout Mr. Painter's testimony there were references to his temper" (*id.* p. 7); also irrelevant would be such facts as that in April 1964 Painter and Helen Boutell abandoned their marriage plans (*id.* p. 10).

In their cataloguing of such facts and innuendoes, and in their bald assertion that "a court may make such an award of custody as best serves the child's welfare" (*id.* p. 24), respondents reveal the true nature of the position they successfully pressed on the court below: The Bannisters are better suited to rear Mark than his own father is, and therefore the court should award custody to them.

It is perfectly plain that Harold Painter, who has some uncommon aspirations and some all-too-common

faults, does not satisfy respondents' concept of the ideal human being. It is true, for example, that after the petition in this case was prepared he and his wife moved from their home in Walnut Creek. (See Br. in Opp. pp. 17-18). They now have a three bedroom home in the coastal redwood area of California, near Santa Cruz. (See Br. in Opp. pp. 17-18.) There Painter works as a free-lance writer and photographer; his wife keeps house and acts as his secretary. In respondents' strange lexicon this presumably makes Painter "unemployed" (see Br. in Opp. pp. 4, 5), but in fact he is doing just what he has always wanted to do and is making a financial and professional success of it.

With respect to most of what respondents say in their statement it is enough to invite attention to the opinions of the trial court, which heard the witnesses, and the Iowa Supreme Court itself. The trial court after canvassing the evidence found that "the plaintiff [Harold Painter], the father of Mark Painter, is a proper and fit person to have the care and custody of his own minor son . . ." (Pet. App. pp. 19a-20a) and that the arrangement by which the Bannisters were to care for Mark was intended to be temporary (*id.* p. 17a). The Supreme Court substantially agreed. (*Id.* pp. 5a, 8a).

There are some matters, however, as to which the record should be set straight.

1. Respondents state that Painter left one job "for less pay because he wanted a job 'that would be just enough to get by and require as little work as possible (R. 42) . . .'" (Br. in Opp. p. 4). The record does not bear out the statement, much less the innuendo. Painter's testimony at the record page cited describes

a plan, not carried out at that time (1959), whereby *his wife* "Jeanne would take a job that would be just enough to get by and require as little work as possible" so that he could try free-lancing on a full-time basis.

Respondents also say that after leaving his job at Washington State University in 1962:

> "Mr. Painter had about eight job offers but turned them all down (R. 51). To support the family his wife, Jeanne, took a full-time job with a newspaper at Moscow, Idaho." (Br. in Opp. p. 5).

Again one is presumably meant to infer that Painter is a scoundrel. But again the cited record page makes clear that such an inference is unwarranted, for the decision that Jeanne Painter should work while her husband tried serious free-lancing was a joint one; the suggestion indeed was hers. (See Pet. p. 7).

2. In referring to Painter's "temper," respondents claim that Painter "said he 'blew his stack' at his wife (R. 144 . . . ." (Br. in Opp. p. 7). The sentence from which this quotation is torn reads as follows: "I also blew my stack at the letter Jeanne received from her father and got quite angry about this."[5]

3. Respondents state that Painter testified he thought Mark should be in a "permanent" home where his school would not be interrupted. (Br. in Opp. p. 8). That is true. At the time Painter had those thoughts

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[5] The inconsequentiality of most of what respondents write is demonstrated by a comparison of the things respondents say about Painter with what could be said about Dwight Bannister on the basis of the record here. Neither tribunal below had any doubt about Bannister's qualifications to act as a parent, although he has a temper (R. 87), seems to be singularly tactless in his dealings with people (R. 100-02) and is capable of deliberately deceiving a father about the whereabouts of his son (R. 96-97, 563-64).

he was working erratic hours on a newspaper, with frequent night work, and Mark was staying with the McNellys, who lived in one of their two house trailers when they were not off on extended fishing trips. (R. 62-63). Of course Painter wanted Mark's life to become settled down, but it is crystal clear that the arrangement with the Bannisters was intended to be temporary, and both courts below so found.[6]

Respondents carry this point a step further with the insinuation that in September 1964 Painter was not really sure whether he wanted his son back:

> "Regarding that visit, he [Painter] testified he 'was not sure about my interest as to taking Mark back in September . . . The same unstable situation existed that existed at the time I sent him to Ames so I was apprehensive about this disrupting of him' (R. 83-84)." (Br. in Opp. pp. 9-10).

Once more the full context gives a different, indeed opposite, impression from respondents' excerpts:

> "I was not sure about my intent as to taking Mark back in September. *I certainly wanted to take Mark back.* I was also concerned about what is

[6] They made the finding with conflicting testimony before them as to what discussion there was of financial arrangements for Mark's care during his stay with the Bannisters. Respondents set forth Dwight Bannister's version, which was that Painter ignored a suggestion that he contribute $50 a month to Mark's support. (Br. in Opp. p. 10). Painter's recollection was that Bannister said no contribution was necessary, and that his, Painter's, offers to pay Mark's medical bills were ignored. (R. 74-75). There is no basis in the record for respondents' suggestion (Br. in Opp. p. 7) that Painter asked them to take Mark to Iowa because his step-parents, with whom Mark was staying, had asked him to help pay for the support of Mark. As the courts below found, petitioner did not abandon his son, financially or otherwise. (*Cf.* Br. in Opp. p. 28).

> in it for him, what is he going to return to. I was not yet married. The same unstable situation existed that existed at the time I sent him to Ames so I was apprehensive about this disrupting of him. By unstable condition, I am referring to the fact that I was not married and that Marylyn and I had not yet decided on a date. I did not have a place rented for Mark and I to live in. I felt there should be some transition period in which Mark had a chance to get acquainted with my wife." (R. 83-84). (Emphasis added).

Against these examples of how respondents have rendered the record, their complaint that petitioner's statement of the case is slanted to the point of inaccuracy (Br. in Opp. p. 16) rings hollow. The prime instance of alleged inaccuracy relates to the Painters' attempt to take Mark from his school in June of 1965. Respondents do not agree that "when the school authorities intervened and called the Bannisters, the Painters desisted rather than use anything resembling force . . ." (Pet. p. 10). The quotation from the record that they give does not bear respondents out. Moreover, it is incomplete and omits this testimony of Harold Painter:

> "When we got [to] the car, we were stopped by the High School Principal, Mr. Schwenk, who informed me I was violating the law by removing Mark from the premises without his permission; that I wasn't the one who had enrolled Mark in school, therefore, I wasn't the one who could remove him from the school grounds.
>
> "I said, 'Fine, we will go into the office and discuss this.'
>
> * * *
>
> "Well, I said at this point, I certainly did not want Mark to engage in a tug-of-war between my-

self and the Bannisters, this would not be a good thing for Mark, this scene. Therefore, I said, our only alternative at this point was to press and take legal action, obtain court order, and we did—then left the premises and took legal action." (R. 104-06; see also R. 166).

III. TO DEPRIVE HAROLD PAINTER, A FIT PARENT, OF THE CUSTODY OF HIS CHILD VIOLATES THE FEDERAL CONSTITUTION

At the very outset of their argument against granting the writ, respondents assert that Harold Painter "does not have a 'family relationship' with Mark because he has not had his custody since July of 1963." (Br. in Opp. p. 19). This ignores the fact, found by the trial court and recognized by the Supreme Court of Iowa, that Mark's stay with the respondents was expressly understood to be on a temporary basis; it was only the respondents' refusal to honor that agreement that prolonged the temporary stay and made this litigation necessary. Respondents' statement is legally as well as factually inaccurate. There is no question that, as Mark's father, Harold Painter had legal custody and control until the Iowa Supreme Court awarded custody to respondents. A parent does not lose custody of his child by allowing him to stay temporarily with others.

This error of respondents underlies their attempt (Br. in Opp. pp. 20-21) to distinguish the decisions of this Court relied on by petitioner for the proposition that parents have constitutional rights with respect to the upbringing and control of their children. Respondents argue that (1) these cases did not involve custody disputes, and (2) the parents recognized as having constitutional rights had custody of the children

in question. Both arguments are wide of the mark. The cases in question (discussed at Pet. pp. 18-21) hold that parents have rights with respect to the upbringing and control of their children that a state may not constitutionally abridge. All these rights would be nullities if there were a constitutionally unrestricted state power entirely to deprive parents of the custody of their children. All other parental rights are corollaries of the basic constitutional right to custody itself. If a state cannot, for example, constitutionally prohibit parents from teaching their children foreign languages, *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), then *a fortiori* a state cannot deprive a parent of the custody of his child altogether—and thus destroy the right to teach him foreign languages, among many other rights—without constitutionally permissible reasons. The parent's right is to the "care, custody, management and companionship" of his child and the direction of the child's upbringing. *May* v. *Anderson,* 345 U.S. 528, 533 (1953).

It thus cannot possibly be disputed that there are substantive constitutional limitations on the power of a state to award custody of a child to persons other than his parents; were that not so, every parental prerogative that this Court has hitherto recognized would be meaningless, since the parent could be deprived of those rights by non-reviewable state action vesting custody in another. The question whether Iowa exceeded those constitutional limitations when it deprived an admittedly fit, non-abandoning, non-divorced parent of custody, in the circumstances in which and on the grounds on which it did so here, is the important and novel question presented in this case.

Respondents' refusal to recognize the difference between the present case and cases in which a family unit has been dissolved by divorce is another aspect of their attempt to deny the existence of a continuing relationship, in law and in fact, between Harold Painter and his son Mark. Respondents declare (Br. in Opp. p. 26 n. 15) that "in both types of cases there has been a dissolution of the family." Here there was no such dissolution, but only a temporary visit that was obviously in Mark's best interests at the time his father initiated it. We submit that it may be reasonable that in some situations involving divorce, where custody of a child has been awarded to a spouse who subsequently dies (by far the most numerous and typical class of custody cases), the surviving parent—who has lost custody either through agreement or through order of the divorce court—may not regain the child if it is found to be in the child's best interests to stay where he is. No "punishment" (*ibid.*) of divorced parents is involved, but merely a recognition of the acts that they themselves have taken. This case, of course, is wholly different. The rule for which petitioner contends is not based on exalting "the interests of the adult litigants" over the "child's interests" (*ibid.*) but on a recognition that, both from the standpoint of the child's interests and as a necessary corollary of the constitutionally required respect by the state for the sanctity of the family, a parent and a child, whose family has never been dissolved or destroyed, are entitled to be together unless unfitness or abandonment is shown.

Respondents urge (Br. in Opp. pp. 21-22) that in *In re Burrus*, 136 U.S. 586 (1890), this Court held

that matters of child custody are the exclusive preserve of the states and cannot present a federal question. There was not and could not be any such holding. The factual and procedural setting of the *Burrus* case makes it clear that the language there used did not carry any such implication as respondents see in it. In *Burrus,* a father disputing custody with a grandparent attempted to recover possession of the child by bringing a *federal* habeas corpus action; the state government was not involved at all. The petitioner's attempt failed; the Court pointed out the well-known statutory limitations on the availability of federal habeas corpus. Constitutionally the decisive fact was that no state action was involved; the dispute was purely between private parties.

In the present case the state *has* acted through its highest court, and the issue presented is whether that state action can be squared with the Fourteenth Amendment. *Cf. New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964). There can be no contention that the broad language in *In re Burrus* would prevent a federal question from arising, if, for example, a state had deprived a parent of custody because he was a Negro or because it disapproved of his religious views. Indeed, in their discussion of the religious aspect of the present case respondents, contending that the Iowa court "remained neutral in the matter of religion" (Br. in Opp. p. 34), implicitly concede, as they must, that if it did *not* remain neutral a federal question would exist. Neither *Burrus* nor any other case removes state action in the child custody area from constitutional scrutiny by this Court. In this area, as in every other, state action will be set

aside if the state has flouted fundamental constitutional prerogatives and freedoms.[7]

Respondents list 36 cases that they claim support their position, though they do not discuss the holdings of any of these cases. (Br. in Opp. p. 25 n. 14). An examination of these decisions, which presumably are the most favorable the respondents could find among the literally thousands of decided child custody cases, is illuminating. Not one of these cases presents a situation fairly comparable to that involved here. As indicated at page 25 of our Petition, many cases speak in terms of the best-interests doctrine, but in no more than two of the cases cited by respondents has that doctrine been applied so as to deprive a fit, non-abandoning, non-divorced parent and his child of their rights to each other's companionship and association.[8]

In most of the cases the parent in question had participated in the dissolution of his family by divorce. In no case in which a court relied on the detrimental effects of returning a child to a parent with whom he had not been living for some time had there been so short a period of separation as is here involved, and in no such case had there been, as here, an express understanding that the separation was to be purely

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[7] Respondents also cite Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930), where the Court quoted the language of *In re Burrus* in passing on the jurisdiction of a state court to decide a divorce action brought against a foreign diplomat. The case has no relevance here.

[8] The possible exceptions are Osburn v. Roberts, 197 Okla. 206, 169 P.2d 293 (1946), and Commonwealth ex rel. Shamenek v. Allen, 179 Pa. Super. 169, 116 A.2d 336 (1955), cited in our Petition, p. 27, n. 15. (See p. 25, *infra*).

temporary. Many of these cases, further, comment on the great weight to be attached in child custody cases to the findings of the trial court, which has an opportunity to observe and assess the parties and witnesses—a weight that the Iowa Supreme Court here notably failed to accord the trial judge's decision that Mark should be returned to his father. Most of the cases acknowledge at least a presumption in favor of even a divorced parent much stronger than the presumption the Iowa court said it allowed the non-divorced parent in this case. Some of the cases cited by respondents declare the precise rule for which petitioner here contends.

A brief review of the salient features of the cases relied on by respondents is appended to this reply brief.

IV. IN NO EVENT CAN A PARENT LAWFULLY BE DEPRIVED OF THE CUSTODY OF HIS CHILD BECAUSE OF HIS POLITICAL OR RELIGIOUS VIEWS

The Brief in Opposition is wholly silent as to the constitutional issue posed by the Iowa court's taking into consideration, in its decision that he should not have custody of his child, the political views and activities of Harold Painter. Thus respondents do not appear to deny that this aspect of the decision below calls for the issuance of a writ of certiorari.

As for the Iowa court's consideration of the religious views and practices of the parties, respondents contend that consideration of such factors was proper "from the standpoint from Mark's temporal welfare" (Br. in Opp. p. 35). It is urged that the fact that "Mr. Painter is either an agnostic or atheist and has no concern for formal religious training," relied on by

the court below, was relevant to Mark's "temporal welfare" in that (1) the boy was "overly-aggressive when he came to Iowa," and the court might properly have concluded that he needed "moral training" in church and Sunday school; and (2) Mark's allegedly strong personal need for stability militated against any change in his life, even a difference in the religious affiliations of his guardian, though he himself would continue to attend Congregational church and Sunday school as in the past.

With respect to the first argument, it is plainly unconstitutional for a state agency to decide, and make effective its decision, that any person needs "moral training" that can be supplied only in a church or a Sunday school. The state may not prefer that type of moral training to other types, such as that which might be furnished by a parent's own teaching and example. If the Iowa court did rely on the first of the two reasons that respondents offer, its decision is blatantly violate of both the free exercise and establishment clauses of the First Amendment.

As to respondents' second proffered justification for the Iowa Supreme Court's consideration of religion, there is no hint in its opinion that its concern for religious views and training stemmed from a view that Mark's particular needs required that his life not be changed in any respect. The simpler and more straightforward explanation of the court's language is much more probable: that, without necessarily preferring any one theology or denomination to another, the court believes generally that religion is a "good thing" and that participation in any one of the conventional forms of organized religion is a hallmark of

a good citizen. That the Iowa court does take this view is confirmed by several of its decisions in child custody cases in which, having concluded that by unfitness a parent has lost his right to custody, it has mentioned the religious habits of the parties contesting custody with him as an indication that the child would be well off with them. *E.g., Kouris* v. *Lunn,* 136 N.W. 2d 502, 504 (Iowa 1965) ("she is a member of a church, but never attends, although she testified she would go to church and would take Jimmie to Sunday School if she secured his custody"); *Durst* v. *Roach* 245 Iowa 342, 62 N.W.2d 159, 168 (1954) ("he and Mrs. Roach are members of a church which they regularly attend, and they have private worship in the home"); *Joiner* v. *Knierniem,* 243 Iowa 470, 52 N.W.2d 21, 24 (1952) ("they are respected citizens in the community. They have maintained a good home and properly reared their children. Each Sunday the children attended church services").

This equation of sound citizenship and proper rearing of children with adherence to some sort of conventional religiosity is precisely the sort of thing that the Constitution forbids. The state may not use a person's non-adherence to conventional forms of religion as a basis for discriminating against him in any way. When the discrimination takes so savage and shocking a form as depriving a father of custody of his own child, the constitutional violation is one that cries out for rectification by this Court.

CONCLUSION

Nothing said in the Brief in Opposition detracts from the gravity of the constitutional questions presented. The writ should issue.

Respectfully submitted,

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APPENDIX

Armstrong v. *Green,* 260 Ala. 39, 68 So.2d 834 (1953): Divorce; separation of parent and child for seven years; a 3-2 decision, with a strong dissent arguing that even a divorced parent must be proved unfit before custody may be denied him. Compare *Griggs* v. *Barnes,* 257 Ala. 21, 57 So.2d 61 (1952).

Henry v. *Janes,* 222 Ark. 89, 257 S.W.2d 285 (1963): Divorce; separation for eight years; neglect bordering on abandonment; extreme fear and dislike of child for parent, who had threatened to kill her. Compare *McLendon* v. *Pelt,* 208 Ark. 287, 185 S.W.2d 931 (1945).

Root v. *Allen,* 151 Colo. 311, 377 P.2d 117 (1962): Divorce; parent acquiesced in the custody of others for twelve years and thus abandoned "obligations as father." Compare *Turner* v. *Hunter,* 142 Colo. 129, 350 P.2d 202 (1960).

Baram v. *Schwartz,* 151 Conn. 315, 197 A.2d 334 (1964): Divorce; ten-year separation. (See Pet. p. 27 n. 15).

Bailey v. *Mars,* 183 Conn. 593, 87 A.2d 388 (1952): Illegitimate child; mother gave her consent to adoption and the child was adopted. The question was whether under the state adoption statute that consent could be revoked so as to terminate the jurisdiction of the probate court. The merits of the custody issue were not reached.

Hitchcock v. *Thomason,* 148 A.2d 458 (D.C. Mun. App.), *rev'd in part on other issue sub nom. Thomason* v. *Thomason,* 274 F.2d 89 (D.C. Cir. 1959): Divorce; express fiinding of parental unfitness. Compare *Bell* v. *Leonard,* 251 F.2d 890 (D.C. Cir. 1958); *In re Stuart,* 114 F.2d 825 (D.C. Cir. 1940), decisions of the highest court of the District of Columbia.

Fielding v. *Highsmith,* 152 Fla. 837, 13 So.2d 208 (1943): Seven-year separation; "neglect" by the parent; strong preference expressed by child, who was thirteen years old. Compare *Meyers* v. *Shefrin,* 146 So.2d 770 (Fla. App. 1962).

Altmiller v. *Forsman,* 76 Idaho 521, 285 P.2d 1064 (1955): Divorce; seven-year separation; court said that a parent may be denied custody only if unfit or "unable to provide proper training and education." Compare *Schiller* v. *Douglas,* 48 Idaho 803, 285 Pac. 1021 (1930).

Giacopelli v. *Florence Crittenton Home,* 116 Ill.2d 556, 158 N.E.2d 613 (1959): Mother had expressly renounced and abandoned the child to defendant home; father had been divorced several times and had a long criminal record; his "past conduct and character . . . fails to inspire any degree of confidence." Three judges advocated express recognition of the fitness rule and declared that this was what the court was really applying. (See Pet. p. 27 n.14).

Hamilton v. *Sourjohn,* 332 Ill. App. 279, 75 N.E.2d 42 (1947): Divorce; acquiescence by parent in the custody of others for ten years.

Scott v. *Ashcraft,* 342 Ill. App. 33, 95 N.E.2d 122 (1950): In this case the parent prevailed, even though the children had lived with others for twelve years. The court expressly stated and applied the rule that the right of a parent is absolute in the absence of unfitness or abandonment.

People ex rel. Bobroff v. *Levin,* 350 Ill. App. 501, 113 N.E.2d 177 (1953): In this case the surviving parent, though previously divorced, prevailed.

Beach v. *Leroy,* 228 Ind. 122, 89 N.E.2d 912 (1950): Voluntary relinquishment of care and custody by the parent for six years.

Brown v. *Beachler,* 224 Ind. 477, 68 N.E.2d 915 (1946): Divorce; four-year separation; the child was "starved" and physically deformed because of maltreatment when the contesting parent last had custody.

Glass v. *Bailey,* 233 Ind. 266, 118 N.E.2d 800 (1954): Voluntary relinquishment for seven years. With this and the two Indiana cases immediately above, compare *Kirkum* v. *Kasprzak,* 242 Ind. 198, 177 N.E.2d 459 (1961).

State ex rel. Paul v. *Peniston,* 235 La. 579, 105 So.2d 228 (1958): Nine-year relinquishment; a concurring opinion interpreted the court's holding as based on abandonment. See *Brown* v. *Ellison,* 162 So.2d 805 (La. App. 1964).

Thumma v. *Hartsook,* 239 Md. 38, 210 A.2d 151 (1965): Parents were "completely unstable" and had voluntarily placed the child with a friend; the court's custody order in favor of the friend was temporary only; there was no final adjudication of the right to custody.

Trenton v. *Christ,* 216 Md. 418, 140 A.2d 660 (1958): Divorce; separation for eight years. With this and the preceding case, compare *McClary* v. *Follett,* 226 Md. 436, 174 A.2d 66 (1961).

In re Adoption of a Minor, 343 Mass. 292, 178 N.E.2d 264 (1961): Illegitimate child; neglect, voluntary relinquishment and separation for six and a half years.

Forbes v. *Warren,* 184 Miss. 526, 186 So. 325 (1939): Separation for 14 years, the entire life of the child, who was "passionately opposed" to going to live with her natural parents. In spite of these facts, there was a strong dissent based on the parental rights doctrine.

Testerman v. *Frederich,* 323 S.W.2d 522 (Mo. App. 1959): Divorce; six-year separation; grave doubt as to parent's mental stability; the two older children, ages 17 and 12, testified they were afraid of him.

In re J ————————, 357 S.W.2d 197 (Mo. App. 1962): Divorce; voluntary relinquishment and separation for four years.

Wall v. *Hardee,* 240 N.C. 465, 82 S.E.2d 370 (1954): Illegitimate child; six-year separation. The case was decided on procedural grounds, and there was no final adjudication as to custody.

McKay v. *Mitzel,* 137 N.W.2d 792 (N.D. 1965): Divorce; separation for eight years; children aged 10 to 15 strongly wished to stay where they were. (See Pet. p. 27 n.15).

Osburn v. *Roberts,* 197 Okla. 206, 169 P.2d 293 (1946): Acquiescence in custody of another for three years, the entire life of the child. (See Pet. p. 27 n.15).

Russell v. *Russell,* 208 Okla. 41, 253 P.2d 136 (1953): Divorce; voluntary relinquishment for ten years.

Taylor v. *Taylor,* 182 Okla. 11, 75 P.2d 1132 (1938): Voluntary permanent relinquishment with a promise not to reclaim; separation for six and a half years, the entire life of the child.

Long v. *McInnich,* 264 P.2d 767 (Okla. 1953): Divorce; separation for eight years, the entire life of the child; evidence as to "general unfitness" and "general misconduct" of the parent. With this and the three preceding cases, compare *Gibson* v. *Dorris,* 386 P.2d 186 (Okla. 1963).

Commonwealth ex rel. Gall v. *Reed,* 202 Pa. Super. 558, 198 A.2d 344 (1964): Divorce; separation for ten years; children "detested and feared" their father; strong evidence of homosexual attacks by father on sons.

Commonwealth ex rel. Ruczynski v. *Powers,* 206 Pa. Super. 415, 212 A.2d 922 (1965): Illegitimate child; contending parent had agreed to adoption. The court stated the issue as whether she was a fit parent and found that she was not. The decision was affirmed by the Pennsylvania Supreme Court, which agreed, 421 Pa. 2, 219 A.2d 460 (1966).

Commonwealth ex rel. Shamenek v. *Allen,* 179 Pa. Super. 169, 116 A.2d 336 (1955): Separation for three years; past misconduct of father resulting in pronounced antipathy of 10-year-old child to him. (See Pet. p. 27 n.15; with the three cited Pennsylvania cases, compare *Commonwealth ex rel. Insalaco* v. *Delconte,* 413 Pa. 221, 196 A.2d 353 [1964], *affirming* 201 Pa. Super. 354, 192 A.2d 750 [1963]).

Smith v. *Smith,* 188 Tenn. 430, 220 S.W.2d 627 (1949): Divorce; case decided on procedural grounds with no adjudication of custody.

King v. *Shrum*, 244 S.W.2d 720 (Tex. Civ. App. 1951): Divorce; five-year separation. (See Pet. p. 27 n.15).

Truttar v. *Pullen*, 311 S.W.2d 723 (Tex. Civ. App. 1958): Divorce; eight-year separation. Case decided on statutory and procedural grounds with no adjudication as to custody.

Stout v. *Massie*, 140 W. Va. 731, 88 S.E.2d 51 (1955): Illegitimate child; adoption already in effect; reflections on moral character of contending parent. Nevertheless there was a strong dissent based on parental rights. Compare *Whiteman* v. *Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960).

Morris v. *Jackson*, 66 Wyo. 369, 212 P.2d 78 (1949): Divorce; four-year separation; implied unfitness of parent, who was "hardly . . . of an exemplary character."